IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

KELLEY CALHOUN, Plaintiff, vs. **O'NEILL VETERINARY CLINIC, P.C., a Nebraska professional corporation**, Defendant.	Case No. 20441 **ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

DATE OF HEARING: (1) March 25, 1999, and,

(2) May 6, 1999.

DATE OF DECISION: June 10, 1999.

APPEARANCES:

For plaintiff:
(1) David W. Jorgensen without plaintiff.
(2) David W. Jorgensen without plaintiff.

For defendant:
(1) Mark A. Christensen.
(2) John P. Heitz in person for evidentiary hearing only on behalf of Mark A. Christensen, and by telephone for arguments only, Mark A. Christensen.

SUBJECT OF ORDER: defendant's motion for partial summary judgment regarding plaintiff's second cause of action.

FINDINGS: The court finds and concludes that:

1. The plaintiff's second cause of action asserts a claim for breach of a written contract. The defendant seeks a partial summary judgment that the plaintiff's right to recovery in that cause of action is limited to the salary and share of profits or losses due as of the date of termination of the contract. The contract provides, in relevant part, as follows:

SECTION NINE
TERMINATION

A. This agreement shall be terminated immediately:

1. If [the plaintiff] becomes disqualified to practice veterinary medicine in the State of Nebraska;

2. On the death of [the plaintiff];

3. If [the defendant] and [the plaintiff] shall mutually agree in writing to such termination;

4. If [the plaintiff] becomes permanently disabled; or

5. If [the plaintiff] fails or refuses to faithfully or diligently perform the duties required under and pursuant to the provisions of this agreement.

B. *On termination for any reason, the salary and share of profits or losses due to the date of such termination shall be full compensation in payment for all claims under this Agreement*.

Exhibit 202, at 6-7 (emphasis supplied).

2. The principles of law applicable to summary judgment motions are well-known:

a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Parker v. Lancaster Cty. School Dist. No. 001*, 256 Neb. 406, ___ N.W.2d ___ (1999).

b. The court views the evidence in a light most favorable to the party against whom the judgment is sought and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided but whether any real issue of material fact exists. *Id*.

d. Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted. *Id*.

3. The meaning of an unambiguous contract presents a question of law. *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 150 (1989). Construction of a contract, if needed, also constitutes a question of law. *Id*.

4. The contractual provision, accorded the plain and ordinary meaning of the words used, is unambiguous. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994). A contract is ambiguous when a word, phrase, or provision has, or is susceptible of, at least two reasonable, but conflicting, interpretations or meanings. *Winfield v. CIGNA Companies*, 248 Neb. 24, 532 N.W.2d 284 (1995). The language used in this case presents one, and only one, conceivable interpretation.

5. The plaintiff seeks to impart ambiguity by interpreting paragraph B in light of its proximity to paragraph A. In effect, the plaintiff seeks this court to read the first clause of paragraph B as "[o]n termination for any [*of the above*] reason[*s*], . . ." Courts are not at liberty to rewrite a contract made the parties, nor should courts add language to that used by the parties and thus change the plain expressed intention of the parties as set out in the contract. *Long v. Magnolia Petroleum Co.* 166 Neb. 410, 89 N.W.2d 245 (1958). A court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992). This court will not construe the contract in such a manner as to add words to those used by the parties.

6. The plaintiff also argues that the agreement should be construed against the party preparing the contract. Because the defendant's attorney drafted the contract, the plaintiff urges this court to construe the contract against the defendant. However, a contract

which is not ambiguous is not open to construction against the drafter or otherwise. *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989). Moreover, the rule of construction against the drafter does not apply to a contract executed with care by the aid and approval of the attorney for each party. *Bee Bldg. Co. v. Peters Trust Co.*, 106 Neb. 294, 183 N.W. 302 (1921). The evidence shows without dispute that this contract was negotiated. The plaintiff received input from an accountant, and had the drafts reviewed by her brother-in-law and by her own attorney.

7. Because the contract is not ambiguous, parol evidence is not admissible to alter, vary, or contradict the terms of a written agreement. *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993); *McCormack v. First Westroads Bank*, 238 Neb. 881, 473 N.W.2d 102 (1991). The court has disregarded all evidence regarding which proper objections were raised concerning the parol evidence rule.

8. Parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach. *Kozlik v. Emelco, Inc.*, *supra*. The Nebraska Supreme Court has consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances. *Id.*; *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989); *Bando v. Cole*, 197 Neb. 722, 250 N.W.2d 651 (1977); *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

9. The next question is whether the amount stipulated constitutes liquidated damages and is thus enforceable, or whether it imposes a penalty and is thus unenforceable.

a. The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: a stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness

or uncertainty, and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach. *Kozlik v. Emelco, Inc.*, *supra*.

b. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. On the other hand, if the damages may be easily and readily ascertained, and if the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty. *Id*.

c. These principles apply employment contracts. *Id*.

d. The reasonableness of the stipulated damages must be judged as of the time the contract was formed. *Id.*

e. At the time of the contract formation, the damages for one party for a breach by the other party could have been greater than ultimately contracted for, no matter which party breached the contract. Thus, such damages were difficult to ascertain because of their indefiniteness or uncertainty. Similarly, the limitation reasonably limited each party to a definite amount by reference to a specific formula. The contract provision constituted a proper liquidated damages clause, and did not constitute a penalty.

10. The plaintiff now asserts that the provision was unconscionable. Generally, a contract is not substantively unconscionable unless the terms are grossly unfair *under the circumstances as they existed at the time* the contract was formed. *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992) (emphasis supplied). Viewed in that light, the provision limited both parties' remedies for breach and was not grossly unfair. The plaintiff's argument lacks merit.

11. Viewed in the light most favorable to the plaintiff, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts

and that the defendant is entitled to partial summary judgment as a matter of law. The motion should be granted.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's motion for partial summary judgment is granted.

2. The plaintiff's right to recovery in the second cause of action of the plaintiff's operative petition, if any, is limited to the salary and share of profits or losses due as of the date of termination of the contract.

Entered: June 10, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.

: Note the decision on the trial docket as: 6/10/99 Signed "Order Granting Partial Summary Judgment" on defendant's motion entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

_____
William B. Cassel, District Judge